

## **SCRA Precludes Oregon from Making you Pay State Income Tax in Oregon while you are Serving there in the PHS**

By Captain Samuel F. Wright, JAGC, USN (Ret.)<sup>2</sup>

4.5—SCRA right to protection against state and local tax authorities

7.0—Military voting rights

**Q: I am an officer in the United States Public Health Service (PHS), a commissioned corps in the United States Department of Health and Human Services. I recently joined the Reserve Officers Association (ROA) after I became aware that PHS officers are eligible for ROA membership.**

**As you explained in Law Review 15041, PHS officers serve with several federal agencies, including the Bureau of Prisons, the Coast Guard, and the Food & Drug Administration. I have served my PHS career so far in Alaska. In a few days, I will be transferred to a new PHS duty station in Oregon. I expect to remain in the PHS for at least 14 more years, to qualify for retirement.<sup>3</sup> Doing an Internet search, I found your Law Review 1018, titled “SCRA Applies to**

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<sup>1</sup> We invite the reader’s attention to [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). You will find almost 1,400 “Law Review” articles about laws that are especially pertinent to those who serve our country in uniform, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997.

<sup>2</sup> Captain Wright is the author or co-author of more than 1,200 of the almost 1,400 “Law Review” articles available at [www.servicemembers-lawcenter.org](http://www.servicemembers-lawcenter.org). He has been dealing with the federal reemployment statute for 33 years and has made it the focus of his legal career. He developed the interest and expertise in this law during the decade (1982-92) that he worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), he largely drafted the interagency task force work product that President George H.W. Bush presented to Congress (as his proposal) in February 1991. On October 13, 1994, President Bill Clinton signed into law the Uniformed Services Employment and Reemployment Rights Act (USERRA), Public Law 103-353. The version that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. Wright has also dealt with the VRRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), and as an attorney in private practice, at Tully Rinckey PLLC. For the last six years (June 2009 through May 2015), he was the Director of ROA’s Service Members Law Center (SMLC), as a full-time employee of ROA. In June 2015, he returned to Tully Rinckey PLLC, this time in an “of counsel” relationship. To schedule a consultation with Samuel F. Wright or another Tully Rinckey PLLC attorney concerning USERRA or other legal issues, please call Mr. Zachary Merriman of the firm’s Client Relations Department at (518) 640-3538. Please mention Captain Wright when you call.

<sup>3</sup> The factual set-up for this article is based on an amalgamation of the situations of two individuals (one PHS and one Army), plus some invented facts to make legal points.

**PHS Officers.” My situation is similar to the situation you discussed in that article, but not exactly.**

**I was born in Alaska and have spent my whole life in the state. I was living in the state when I joined the PHS Corps in 2009, and I have spent my first six years of PHS active service in Alaska. The PHS will soon transfer me to a new duty station in Oregon.**

**Alaska is one of a handful of states that have no state income tax.<sup>4</sup> My question is: When I transfer from Alaska to Oregon for the next three to six years (or possibly longer), will I be required to pay Oregon state income tax on my PHS income while I am physically residing in the State of Oregon because my PHS duty station is located there?**

**I checked out the website of the Oregon Department of Taxation (ODT). The website says that members of the *armed forces* who are serving in the State of Oregon but who are not domiciled there are exempt from having to pay Oregon state income tax while on active duty and serving in Oregon. The PHS commissioned corps is not an armed force, but it is a uniformed service.**

**In your Law Review 1018, you wrote that PHS officers are treated exactly like active duty members of the Army or Navy for purposes of the Servicemembers Civil Relief Act (SCRA). Am I exempt from having to pay the Oregon state income tax on my PHS salary while serving in Oregon for the next three to six years?**

**A:** Yes. The ODT website should say that members of the *uniformed services* (not just the armed forces) are exempt from having to pay Oregon state income tax while serving in Oregon, if they are not Oregon domiciliaries and are in the state only because of their uniformed service duties. It would be unlawful, under the SCRA, for Oregon to charge you state income tax for the period that you are living in Oregon only because your PHS duties require your presence in the state. Under the SCRA, PHS officers are treated exactly like members of other uniformed services for SCRA purposes.

Title 10 of the United States Code, section 101 (the definitions section) defines several terms, including “armed forces” and “uniformed services.” The armed forces are the United States Army, Navy, Marine Corps, Air Force, and Coast Guard.<sup>5</sup> The uniformed services are the armed forces plus the commissioned corps of the PHS and the commissioned corps of the National Oceanic and Atmospheric Administration (NOAA).<sup>6</sup>

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<sup>4</sup> There are currently seven states with no state income tax: Alaska, Florida, Nevada, South Dakota, Texas, Washington, and Wyoming. In addition, New Hampshire and Tennessee tax only dividend and interest income. See [www.govspot.com/know/incometax.htm](http://www.govspot.com/know/incometax.htm).

<sup>5</sup> 10 U.S.C. 101(a)(4).

<sup>6</sup> 10 U.S.C. 101(a)(5).

The SCRA is codified in title 50 Appendix of the United States Code, sections 501 through 596 (50 U.S.C. App. 501-596).<sup>7</sup> The SCRA's definition section makes clear that PHS and NOAA officers are covered while in active service. "The term 'military service' means— ... (B) in the case of a servicemember who is a commissioned officer of the Public Health Service or the National Oceanic and Atmospheric Administration, active service."<sup>8</sup>

"A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders."<sup>9</sup>

"Compensation of a servicemember for military service shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the servicemember is not a resident or domiciliary of the jurisdiction in which the servicemember is serving in compliance with military orders."<sup>10</sup>

While you are serving in Oregon for the next few years, you should continue voting in Alaska, by absentee ballot. You must not register to vote in Oregon, because doing so would clearly make you an Oregon domiciliary. You cannot have it both ways. You cannot be an Alaskan for tax purposes and an Oregonian for voting purposes. Like any human being, you have one and only one domicile at a time, for all legal purposes.

"Evidence that a person registered or voted is admissible and ordinarily persuasive when the question of domicile is at issue." *Comptroller of the Treasury v. Lenderking*, 268 Md. 613, 619, 303 A.2d 402, 405 (1973). This holding of the Maryland Court of Appeals (Maryland's high court) has been cited with approval and upheld in eight later Maryland high court decisions: *Reeder v. Board of Supervisors of Elections of Queen Anne's County*, 269 Md. 261, 305 A.2d 132 (1973); *Knapp v. Comptroller of the Treasury*, 269 Md. 697, 309 A. 2d 635 (1973); *Bartell v. Bartell*, 278 Md. 12, 357 A.2d 343 (1976); *Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (1979); *Wamsley v. Wamsley*, 333 Md. 454, 635 A.2d 1322 (1994); *Roberts v. Lakin*, 340 Md. 147, 665 A.2d 1024 (1995); *Blount v. Boston*, 351 Md. 360, 718 A.2d 1111 (1998); and *Oglesby v. Williams*, 372 Md. 360, 812 A.2d 1061 (2002). The Oklahoma Supreme Court has also cited *Lenderking* with approval and has followed it. See *Suglove v. Oklahoma Tax Commission*, 1979 OK 168, 605 P.2d 1315 (1979). It is very likely that the Oregon Supreme Court would also follow this line of logic. Do not register to vote in Oregon if you want to be exempt from the Oregon state income tax.

**Q: My wife and I own an automobile, which we purchased in Alaska. The vehicle is titled in Alaska and has Alaska license tags. When we move to my new duty station in Oregon in a few**

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<sup>7</sup> Congress enacted the SCRA in 2003, as a long-overdue rewrite of the Soldiers' and Sailors' Civil Relief Act (SSCRA), which was originally enacted in 1917, shortly after the United States entered World War I.

<sup>8</sup> 50 U.S.C. App. 511(2)(B).

<sup>9</sup> 50 U.S.C. App. 571(a).

<sup>10</sup> 50 U.S.C. 571(b).

**days, we will be driving the vehicle to Oregon and will be using it there. If Oregon has a personal property tax on vehicles, will Oregon be permitted to impose that personal property tax on this vehicle?**

**A:** No. The SCRA provides: “The personal property<sup>11</sup> of a servicemember or the spouse of a servicemember shall not be deemed to be located or present in, or to have a situs for taxation in, the tax jurisdiction in which the servicemember is serving in compliance with military orders.”<sup>12</sup> So long as you are not domiciled in Oregon but are only there because your PHS duties require your presence there, Oregon is precluded from taxing your vehicle, your furniture, and other personal (moveable) property. See *Dameron v. Brodhead*, 345 U.S. 322 (1953).<sup>13</sup>

**Q: My wife works outside the home and earns substantial income. In some years, she earns more than I earn. Will Oregon be able to tax her income and her personal property?**

**Like me, my wife was born in Alaska and has lived there her entire life. We got married in 2008, ten months before I joined the PHS in 2009. We have lived together in an apartment in Alaska for the entire time that we have been married, including the entire time that I have been serving in the PHS. When I transfer to my new duty station in Oregon, she and our young children will accompany me and will live in Oregon to be near my new duty station.**

**A:** Under the SCRA as amended in 2009 by the Military Spouse Residency Relief Act, your wife can be exempt from having to pay Oregon state income tax and personal property tax to Oregon during the years that you are assigned to PHS duties in Oregon. Here are the two pertinent SCRA provisions:

A spouse of a servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the spouse by reason of being absent or present in any tax jurisdiction of the United States *solely to be with the servicemember in compliance with the servicemember’s military orders if the residence or domicile, as the case may be, is the same for the servicemember and the spouse.*<sup>14</sup>

Income for services performed by a spouse of a servicemember shall not be deemed to be income for services performed or from sources within a tax jurisdiction of the United States if the spouse is not a resident or domiciliary of the jurisdiction in which the

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<sup>11</sup> Personal property refers to property that can be moved: vehicles, furniture, etc. Personal property is distinguished from real property (buildings, land) which cannot readily be moved.

<sup>12</sup> 50 U.S.C. App. 571(d)(1).

<sup>13</sup> This is a 1953 decision of the United States Supreme Court. The citation means that you can find the case in Volume 345 of *United States Reports*, and the case decision starts on page 322. The Supreme Court held that the SSCRA (predecessor of the SCRA) precluded the City of Denver from taxing the furniture and household goods of an Air Force officer who physically resided in the city but was domiciled in Louisiana. The Supreme Court held that it did not matter that Louisiana did not tax the officer’s personal property. The Supreme Court also rejected the argument that Congress lacked the constitutional authority to exempt active duty service members from state and local taxes. Please see Law Review 0917 (April 2009) for a detailed discussion of *Dameron*.

<sup>14</sup> 50 U.S.C. App. 571(a)(2) (emphasis supplied).

income is earned because the spouse is in the jurisdiction *solely to be with the servicemember serving in compliance with military orders*.<sup>15</sup>

Because your wife currently shares your Alaska domicile with you, and because she is moving to Oregon solely to be with you and to continue the marriage, the SCRA exempts her from having to pay Oregon state income tax on all the income that she earns while physically residing in Oregon (to accompany you) but domiciled in Alaska. It is interesting to note that the SCRA only exempts you from having to pay Oregon state income tax on your PHS income.<sup>16</sup> But the SCRA exempts *all* of your wife's income while physically residing in Oregon but domiciled in Alaska.

**Q: My wife and I have already purchased a house in Oregon, near my new PHS duty station. Is Oregon precluded from charging us property tax on the house and land? Does the fact that we will be living in a purchased house, rather than a rented house or apartment, make us Oregonians and make us liable for Oregon's state income tax and personal property tax?**

**A:** Real property tax is imposed on the property itself, and real property (land, buildings) does not move. If you own real property in Oregon, you must pay the property tax on the real property, without regard to your state of domicile and without regard to your status as a member of a uniformed service or as the spouse of a member of a uniformed service. The fact that you and your wife have chosen to purchase a house in Oregon, rather than living in a rented house or apartment, does not detract from the conclusion that you are not domiciled in Oregon and that you will be physically residing in Oregon for the next several years only because your PHS duties require your presence there.

**Q: Alaska entered the union as a state in 1959, several years before I was born. Alaska has never had a state income tax. There has been plenty of state income from the production of oil. But the price of oil has dropped below \$50 per barrel, and the production of oil has fallen off as some fields are being exhausted. The state government is having fiscal problems, and there is talk that it may be necessary to establish a state income tax in Alaska for the first time. If Alaska establishes a state income tax next year or in some subsequent year while I am still serving in the PHS, will it be possible for me to reconsider the idea of being an Alaska domiciliary?**

**A:** Yes. You can change your domicile while you are on active duty or in active service. To make a change, you need a physical presence in the state to which you wish to change and the intent to make the place your home, and you need both elements simultaneously. To change to Oregon while you are serving in Oregon, you only need to register to vote in Oregon and to announce that you have decided to make Oregon your home and to renounce your Alaska domicile.

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<sup>15</sup> 50 U.S.C. App. 571(c) (emphasis supplied).

<sup>16</sup> If you have a moonlighting job or dividend or interest income, Oregon is not precluded from taxing that income.

You must have a physical presence in the state to which you wish to change, along with the requisite intent, at the time you make the change. This is not a matter of “pick a state, any state.” You cannot become a Texan<sup>17</sup> while serving in Oregon.

**Q: It is very likely that for the next three to six years my wife and I will be physically living in Oregon, in our new home near my new PHS duty station, but we will maintain our domiciles in Alaska, even if Alaska finds it necessary to establish a state income tax next year. While we are physically living in Oregon but domiciled in Alaska, are we eligible to vote by absentee ballot in Alaska?**

**A:** Yes. You and your wife will both be eligible to vote by absentee ballot in Alaska, under a federal law called the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).<sup>18</sup> You qualify as an “absent uniformed services voter” (AUSV) under UOCAVA because you are “a member of a uniformed service<sup>19</sup> on active duty who, by reason of such active duty, is absent from the place of residence where the member is otherwise qualified to vote.”<sup>20</sup> Your wife qualifies as an AUSV under UOCAVA because she is “a spouse or dependent of a [service] member referred to in subparagraph (A) or (B) who, by reason of the active duty or service of the member, is absent from the place of residence where the spouse or dependent is otherwise qualified to vote.”<sup>21</sup>

**Q: How do we go about applying for absentee ballots in Alaska?**

**A:** It is important that you use the Federal Post Card Application (FPCA)<sup>22</sup> to apply for an absentee ballot. You complete the form and send it to the Lieutenant Governor of Alaska, who is the state’s chief state election official.<sup>23</sup>

It is still possible to obtain and fill out the old-fashioned, paper FPCA form. In the second decade of the 21<sup>st</sup> Century, a much better way is to go to [www.overseasvotefoundation.org](http://www.overseasvotefoundation.org), the website of the Overseas Vote Foundation (OVF).<sup>24</sup> The website contains an easy to use “wizard” that you can use to complete the form in a way that is complete, correct, and legible. The OVF website will also facilitate your submission of the completed form by electronic

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<sup>17</sup> Texas is another no state income tax state.

<sup>18</sup> UOCAVA is a federal statute that was enacted in 1986. It is codified in title 52 of the United States Code, at sections 20301 through 20311 (52 U.S.C. 20301-20311).

<sup>19</sup> Like the SCRA, UOCAVA explicitly applies to all seven uniformed services, including PHS and NOAA, and not just to the five armed services.

<sup>20</sup> 52 U.S.C. 20310(1)(A).

<sup>21</sup> 52 U.S.C. 20310(1)(C).

<sup>22</sup> The FPCA is misnamed. For more than a decade, this federal form has folded over into a sealed envelope. Since a new FPCA form was adopted in 2004, it has not been necessary for you to put personal information (date of birth, Social Security number, etc.) on an open postcard.

<sup>23</sup> In Alaska and Maine, unlike the other 48 states, absentee voting is administered centrally at the state level, rather than by counties or municipalities.

<sup>24</sup> Any UOCAVA voter is eligible to use the FPCA and the OVF website, and this includes uniformed services personnel and spouses within the United States.

means. You will receive your unmarked absentee ballot, either electronically or by mail. You mark your ballot and place it in the unmarked “inner envelope” and seal that envelope. You then place the sealed inner envelope and place that inner envelope in the outer envelope. You complete the affidavit on the back of the outer envelope and mail the marked ballot back to the Lieutenant Governor.<sup>25</sup>

**Q: Are we eligible to vote for all elections? Or only federal elections?**

**A:** UOCAVA only applies to federal elections, but as a matter of Alaska law you and your wife are absent from the state for temporary purposes, and you can maintain your Alaska domiciles. Under Alaska law, you are eligible to vote by absentee ballot for all offices.

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<sup>25</sup> The purpose of the double envelope system is to preserve the secrecy of your ballot. The election officials review the completed affidavits and make the necessary determinations about identity and eligibility before they open the outer envelopes. Then, the still-sealed inner envelopes are removed from the outer envelopes and the outer envelopes are removed from the room. When the election officials review and count the marked ballots, they have no way of knowing the identity of any one voter and the secrecy of the ballot is preserved.